NTSB Order No.
EM-155

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 15 day of May, 1989

PAUL A. YOST, Commandant, United States Coast Guard,

v.

CLARENCE DAVIS, Appellant.

Docket ME-132

OPINION AND ORDER

Appellant challenges a December 22, 1987 decision of the Commandant (Appeal No.2463) affirming an order served by Administrative Law Judge Michael E. Hanrahan on June 11, 1987 that revoked his merchant mariner's license (No. 549530) and document (No. 264 58 4961) following an evidentiary hearing completed on April 29, 1987.[1] The law judge had found proved two charges of misconduct on specifications alleging that appellant while serving under the authority of his license and document had on separate occasions assaulted and battered fellow crewmembers. On appeal to the Board, the appellant contends that the Commandant's decision upholds the law judge's order notwithstanding procedural errors in the conduct of the hearing that warrant either the reversal of the revocation or a remand for a new trial.[2] Because we find, as discussed below, no merit in appellant's contention, we will deny his appeal.[3]

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[1]Copies of the decisions of the Commandant and the law judge are attached.

[2]The Coast Guard has filed a reply brief opposing the appeal.

[3]Appellant also assigns error to the Commandant's assertions to the effect that, absent clear error, matters not objected to at the hearing cannot be raised for the first time on appeal to him. Inasmuch as the Commandant, despite his comments regarding the waiver of objections not presented to the law judge, essentially undertook to rule on the merits of appellant's procedural points, we do not perceive appellant's disagreement with the Commandant's dicta concerning waiver as establishing an additional issue for our

Appellant, by counsel, argues, first, that the law judge erred by not advising him, either at the outset of his evidentiary hearing or when his counsel subsequently withdrew, of his right to be represented by professional counsel or any other person he might desire. See 46 CFR § 5.519(a)(1).[4] We think this argument has little to commend it.

It is clear from the record that appellant had been advised by the Coast Guard Investigation Officer prior to the hearing of his right to appear with counsel and that the appellant had so appeared at his hearing, at which time the law judge advised him of all of his other rights under 46 CFR § 5.519.[5] Since appellant had appeared with counsel, we do not think it was incumbent on the law judge to engage in the empty formality of advising him of a right of which he had already availed himself. However, because appellant was apparently unable to pay for his attorney's services, he consented to counsel's withdrawal and indicated, when questioned by the law judge, no objection to going forward without him. We see nothing unreasonable in the Commandant's construction that in these circumstances the regulation imposed no obligation on the law judge to re-advise appellant of his right to counsel. Appellant's very appearance with counsel initially reflected his knowledge of the right; nothing in appellant's brief persuades us that he ought to have been reminded of the right on the heels of his release of an attorney for financial reasons.

Appellant next argues that the law judge erred in considering his prior disciplinary record because it involved a matter over 10 years old and 46 CFR § 5.565(a) prohibits consideration of incidents occurring over 10 years earlier.[6]

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review.

[4]Appellant was represented by counsel on his appeal to the Commandant from the law judge's decision.

[5]Those rights include the right to subpoena witnesses and evidence, to examine and cross examine witnesses and introduce evidence, and to testify or remain silent.

[6]46 CFR § 5.565(a) provides as follows:

"§5.565 **Submission of prior record and evidence in aggravation or mitigation**.

(a) Except as provided in § 5.547 and §5.549, the prior record of the respondent may not be disclosed to the Administrative

The Commandant, citing 46 CFR §5.549(b), found such consideration permissible, pointing out that where appellant, as here, repeatedly and falsely claims an unblemished record extending back more than 10 years, the limitation on the use of a prior record in § 5.565(a) does not preclude the introduction of evidence that would impeach the claim, even though that evidence may include a record of an incident more than 10 years old.[7] In this connection, the Commandant asserts that the purpose of the regulations is to limit the use of evidence that may be too remote in time to be still probative, not to create a shield whereby a seaman's past record might be misrepresented with impunity. Once again, we are persuaded that the Commandant's construction of his regulations is unreasonable.

The intent of §5.549(b), as we read it, was, for the most part, to prohibit the Coast Guard from introducing any evidence of a prior record, regardless of when an incident may have occurred, until after the law judge had entered his findings and conclusions. If the Coast Guard's charges were found proved, such evidence might be relevant in determining an appropriate order on sanction. The on exception to the prohibition against admission before the sentencing stage pertained to the use of a prior record "for the limited purposes of impeaching the credibility of evidence offered by the [seaman] regarding a disciplinary record."

Section 5.565 sets forth the matters in "aggravation or mitigation" that may be considered by the law judge after a charge has been proved. It is in this connection that the regulation

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Law Judge until after conclusions have been made as to each charge and specification, and then only if at least one charge has been found proved. The prior record must include only information concerning the respondent and is limited to the following items less than 10 years old...."

* * * * *

[7]46 CFR §5.549(b) provides as follows:

"§ 5.549 **Admissibility of respondent's Coast Guard records prior to entry of findings and conclusions**.

* * * * * *

(b) In addition to the use of a judgment of conviction as provided in § 5.547, the prior record of the respondent, as defined in § 5.565, is admissible when offered by the investigation officer for the limited purposes of impeaching the credibility of evidence offered by the respondent regarding a disciplinary record."

provides that evidence about a seaman's "prior record must include only information concerning the [seaman] and is limited to the following items less that 10 years old...." Since section 5.549 would in some instances permit the introduction of evidence during a hearing that otherwise would be barred by section 5.565 from consideration until the merits of the charges have been adjudicated, we do not think that the age limit expressly applicable to records considered under the latter section can reasonably be construed to be a limitation on the former. While the age of a prior incident may well be relevant to the formulation of an appropriate sanction, it is not a factor that ordinarily affects the probative value of such evidence in the context of assessing the truthfulness of testimony that places the record in issue. We think the regulations can fairly be read to permit a balancing of the interests in preserving the integrity of the factfinding process and in ensuring that sentencing decisions are not influenced by essentially stale offenses.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and

2. The order of the Commandant affirming the law judge's revocation of appellant's merchant mariner's license and document is affirmed.

KOLSTAD, Acting Chairman, BURNETT, LAUBER, NALL and DICKINSON, Members of the Board, concurred in the above opinion and order.